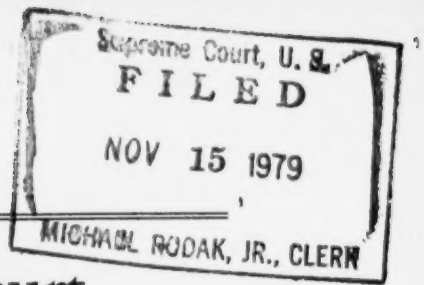


JOINT APPENDIX



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
Petitioner

vs.

MIDCAL ALUMINUM, INC., a California corporation,
Respondent

BAXTER RICE as Director of the Department of
Alcoholic Beverage Control of the State of California
Respondent

On Writ of Certiorari to the Court of Appeal of the
State of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI
FILED JULY 19, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

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**On Writ of Certiorari to the Court of Appeal of the
State of California, Third Appellate District**

The following Opinion and Order have been omitted in
printing this appendix because they appear on the follow-
ing pages of the appendices to the printed Petition for
Writ of Certiorari:

Opinion of the Court of Appeal of the State of California,
Third Appellate District A-1

Order of the Supreme Court of California denying
Intervenor's Petition for Hearing B-1

**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MIDCAL ALUMINUM, INC., *Petitioner*

vs.

BAXTER RICE, *Respondent*

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
Intervenor

<u>Date</u>	<u>Filings—Proceedings</u>
8-18-78	Petition for writ of mandate
8-29-78	Letter from Damrell, Damrell & Nelson to Justice Evans
8-29-78	Stay order
9- 6-78	Certified copy of original stay order
9-15-78	Ex parte application for leave to file complaint in intervention
9-19-78	Respondent's opposition to petition
9-22-78	Order allowing issuance of alternative writ of mandate
9-22-78	Alternative writ of mandate
9-22-78	Order discharging 8-29-78 issuance of stay order
9-28-78	Letter from George Roth to Justice Puglia
9-28-78	Order discharging 9-22-78 stay order
10-12-78	Intervenor's response to petition
10-12-78	Points and authorities in support of intervenor's opposition to petition
11- 6-78	Petitioner's reply to opposition
3-26-79	Opinion by Justice Reynoso
4- 9-79	Petition for rehearing
4-18-79	Answer to petition for rehearing
4-19-79	Order denying petition for rehearing
5- 7-79	Petition for hearing (California Supreme Court)
5-15-79	Answer to petition for hearing (California Supreme Court)
5-24-79	Order denying hearing (California Supreme Court)
5-29-79	Stay order
6-25-79	Request to certify the record and transmit it to the Supreme Court
6-27-79	Stay order
7-19-79	Stay order

In the Court of Appeal of the State of California
Third Appellate District

Civil No. 3 Civ. 17992

<p>Midcal Aluminum, Inc., a California corporation,</p>	<p>Petitioner,</p>
vs.	
<p>Baxter Rice as Director of the Department of Alcoholic Beverage Control of the State of California,</p>	<p>Respondent.</p>

Petition for Writ of Mandate
Request for Temporary Stay
Supporting Memorandum of Points and Authorities

* * *

[Title Omitted in Printing]

PETITION FOR WRIT OF MANDATE

* * *

Petitioner, MIDCAL ALUMINUM, INC., a California corporation, petitions this Court for a writ of mandate directed to Respondent, Baxter Rice, as Director of the Department of Alcoholic Beverage Control of the State of California (hereinafter called "Director"), and by this verified Petition alleges:

1. Petitioner is, and at all times hereinafter mentioned in this Petition was, a California corporation having a premises and place of business in Los Angeles County, State of California, at 2650 Commerce Way, Commerce, California 90022, where and from which it transacts and has transacted business as a duly licensed wholesaler of wine and distilled spirits pursuant to a Beer and Wine Wholesaler's license and a Distilled Spirits Wholesaler's license issued by the Department of Alcoholic Beverage Control of the State of California (hereinafter called "Department"), which said licenses are, and were at all times mentioned in this Petition, valid and fully effective. Additionally, Petitioner holds other licenses issued by the Department which are and were at all times mentioned in this Petition, valid and fully effective; namely, Beer and Wine Importer, Distilled Spirits Importer and Off-Sale Beer and Wine licenses. As a duly licensed wholesaler of wine and distilled spirits as aforesaid, distributor sells, and at all times mentioned in this Petition has sold, wine products and brandy to retailers in Los Angeles and Orange Counties in the State of California for resale to consumers pursuant to alcoholic beverage retail licenses likewise issued to said retailers by the Department.

2. The Department is, and at all times herein mentioned was, a duly and regularly constituted agency and department of the State of California. Respondent Director is the duly appointed, qualified and incumbent director of the Department and its chief executive officer.

3. Respondent has a clear, present and legally mandated duty to administer and enforce the provisions of the Alcoholic Beverage Control Act (Division Nine of the

Business and Professions Code) in conformity with the laws of the State of California and the laws of the United States. Such laws do not sanction or permit the administration and enforcement of provisions of any law, including those of said Alcoholic Beverage Control Act, which are unconstitutional on their face. As will hereinafter appear, the price-posting provisions of the Alcoholic Beverage Control Act are unconstitutional and in violation of the Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.). Specifically, Sections 24862 and 24866 of the Business and Professions Code, the regulations promulgated to implement those sections (Calif. Admin. Code, Chapter 1, Title 4, Section 101) and the enforcement actions of the Department in accordance with such sections and regulations are unconstitutional. Nevertheless, Respondent has advised licensees that the Department has no choice but to continue to administer and enforce those sections (including Sections 24862 and 24866) of the law, by memorandum dated July 6, 1978, to all price-posting licensees, and by letter dated July 11, 1978, to Mr. John DeLuca, President, Wine Institute, copies of which memorandum and letter are attached hereto as Exhibits "A" and "B" respectively.

4. Prior to May 30, 1978, Petitioner complied fully with the price-posting provisions of the Alcoholic Beverage Control Act (Division Nine of the Business and Professions Code) and the regulations adopted to implement such price-posting provisions.

5. On May 30, 1978, the California Supreme Court ruled that certain price-posting provisions of the Business and Professions Code were invalid in that they violated the Federal Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.).

Rice v. Alcoholic Beverage Control Appeals Board (Corsetti) (1978) 21 Cal.3d 431.

6. The *Rice (Corsetti)* decision was limited by its facts to the statutory provisions and regulations applicable to minimum consumer price posting for distilled spirits and beer [Business and Professions Code, Section 24755; Cal. Admin. Code, Title 4, Section 99, subdivision (a)]. However, the clear impact of the *Rice (Corsetti)* decision, as evidenced by the language and the reasoned analysis of the court, was to rule that all price-posting provisions of the Code were invalid.

7. Petitioner has a clear, present and substantial right to be protected from enforcement by Respondent of the unconstitutional price-posting provisions of the Alcoholic Beverage Control Act. Petitioner and Petitioner's licensed retail customers are licensees of Respondent and the continued legal distribution and sale by Petitioner of bottled wine products to Petitioner's licensed retail customers are dependent upon the issuance and renewal of Petitioner's license by Respondent. On August 15, 1978, Respondent filed an Accusation against Petitioner, threatening Petitioner with penalties because Petitioner failed to comply with the price-posting provisions of the Business and Professions Code, Section 24862, and Rule 101 of Chapter 1, Title 4, California Administrative Code. A copy of the Accusation is attached hereto as Exhibit "C" and incorporated herein. Attached hereto as Exhibit "D" and incorporated herein is a Stipulation dated August 15, 1978, in which Petitioner, by its attorney, Frank C. Damrell, Jr., stipulated to the truthfulness of the facts set forth in said Accusation and further stipulated that the Department may,

subject to a judicial determination of the constitutionality of Section 24850, et seq., Business and Professions Code, "Wine Fair Trade Contracts and Price Posting," and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of Petitioner's licenses as provided in Section 24880 of the Business and Professions Code.

8. If, on the other hand, Petitioner complies with such unconstitutional price-posting provisions, Petitioner may be subjected to substantial claims and potential liabilities, criminal and civil, for allegedly violating the Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.) in light of the *Rice (Corsetti)* decision.

9. Among other things, said unconstitutional price-posting provisions prohibit the sale in this state by licensed wholesalers, such as Petitioner, of bottled wine to licensed retailers except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract filed with the Department. Since May 30, 1978, and particularly during the month of July, 1978, Petitioner sold bottled wine to licensed retailers in California, as alleged in the Accusation attached hereto as Exhibit "C", not listed in or at prices other than those contained in an effective price schedule or an effective fair trade contract filed with the Department.

10. Petitioner faces additional, immediate and substantial financial loss in that licensed retail customers of Petitioner have informed Petitioner that they will refuse to buy or resell bottled wine products sold and distributed by Petitioner unless such bottled wine products and the prices

at which Petitioner will sell them to licensed retailers are included in an effective price schedule or in an effective fair trade contract filed with the Department.

11. Petitioner is the party beneficially interested in the relief sought in this Petition for the following reasons:

(a) Respondent has filed an Accusation against Petitioner, and Petitioner is threatened with a monetary penalty or suspension of Petitioner's license to sell wine products at wholesale in the State of California (Exhibits "C" and "D").

(b) Petitioner is placed in the untenable position of having to choose between obeying federal and state laws which conflict with each other and being threatened with penalties for disobeying whichever one Petitioner fails to comply with.

(c) Petitioner may be subjected to substantial claims and potential liabilities, civil and criminal, for allegedly violating the Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.) if it obeys the invalid state law.

(d) Petitioner risks substantial financial loss because licensed retailers will refuse to buy or resell bottled wine products sold and distributed by Petitioner if Petitioner obeys the California Supreme Court and the Federal Sherman Anti-Trust Law and fails to comply with the unconstitutional price posting provisions of the Alcoholic Beverage Control Act being enforced by Respondent.

12. Respondent has failed and refused, and continues to fail and refuse, to recognize the invalidity and unconstitutionality of the price-posting provisions of the Al-

coholic Beverage Control Act, but rather continues to administer and enforce the same.

13. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, other than the relief sought in this Petition, in that:

(a) Petitioner should not be required to defend itself in quasi-judicial license suspension or revocation proceedings charging Petitioner with a violation of a patently unconstitutional statute.

(b) Defense in such quasi-judicial proceedings would be to no avail, since admittedly Petitioner has not complied with the unconstitutional price-posting provisions, and since the quasi-judicial body claims it has no authority to rule on the constitutionality of such unconstitutional price-posting provisions.

(c) Defense in such quasi-judicial proceedings and appeal therefrom would be prohibitive to Petitioner in terms of time and economic losses.

(d) Petitioner faces immediate and substantial losses unless a stop to the enforcement of the aforesaid unconstitutional price-posting provisions is ordered by this Court.

(e) Mandamus from this Court directed to the Director of the Department is the only immediate remedy for declaring the wine price-posting provisions of the Alcoholic Beverage Control Act, and regulations promulgated pursuant thereto, unconstitutional (Business and Professions Code, Section 23090.5).

14. In view of the clear unconstitutionality of the aforesaid price-posting statutory provisions and regulations,

and the immediate, substantial and irreparable harm to Petitioner by Respondent's continued enforcement thereof, Petitioner seeks an immediate stay of Respondent's enforcement of such price-posting provisions and regulations and an order that Respondent cease, desist and refrain from any further action enforcing such price-posting provisions and regulations, pending a hearing on this matter.

15. This Petition is made to this Court in the first instance rather than to the Superior Court of the State of California, County of Sacramento, for the reason that this Court is the court of original jurisdiction for the filing of a Writ of Mandate directed at administrative actions of the Director of the Department of Alcoholic Beverage Control under Section 23090.5 of the Business and Professions Code.

WHEREFORE, Petitioner prays judgment against Respondent as follows:

1. That this Court issue an alternative writ of mandate commanding Respondent to dismiss the Accusation filed on August 15, 1978, against this Petitioner and to cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Sections 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and regulations promulgated pursuant thereto, and more particularly Rule 101 of Chapter 1, Title 4, California Administrative Code, or to show cause before this Court at a specified time and place why he has not done so.

2. That, pending a hearing on this Petition, this Court issue its stay order commanding Respondent to cease, de-

sist and refrain from further action on the Accusation filed against this Petitioner on August 15, 1978, and from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 of Chapter 1, Title 4, California Administrative Code.

3. That, on the hearing of this Petition and the return thereto, if any, this Court issue its peremptory writ of mandate compelling Respondent to dismiss the Accusation filed on August 15, 1978, against this Petitioner and to cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act and regulations adopted pursuant thereto.

4. For costs of this proceeding and such other and further relief as the Court may deem proper.

Dated: August 18, 1978.

[Signature and Verification Omitted in Printing]

EXHIBIT A

Letterhead of Department of Alcoholic Beverage Control

July 6, 1978

TO: ALL PRICE POSTING LICENSEES

As you are aware, the May 30, 1978, decision of the California Supreme Court in the matter of *Rice v. Alcoholic Beverage Control Appeals Board* struck down the consumer price maintenance provisions of Section 24755 of the Alcoholic Beverage Control Act.

Some confusion has arisen among [sic] price posting licensees as to the impact of that decision on related sections and regulations within the Act dealing with price filings at other levels.

The decision of the court, which is now in effect, dealt only with the *consumer* price filings for distilled spirits and beer. Accordingly, brand owners or authorized licensees who were previously filing Forms ABC-705 (distilled spirits) and ABC-704 (beer) need no longer, and should not, continue to file those forms with the Department.

The question before the court and the resulting decision did not directly address or affect Sections 24862 (wine), 25000 (beer), and 24756 (distilled spirits) which require supplier level licensees to file price schedules showing the prices at which alcoholic beverages are sold to *retailers*.

Therefore, licensees who were previously filing price and discount schedules for prices at the wholesaler to retailer level, including brewery to wholesaler in the case of beer, must continue to comply with the applicable sections of law and adhere to such prices and discounts on all sales.

Any question as to the constitutionality of the sections cited above must be resolved by legislative action or by a court decision. In the meantime, the Department has no choice but to continue to administer and enforce those sections of law.

[Signature Omitted in Printing]

EXHIBIT B

Letterhead of Department of Alcoholic Beverage Control

July 11, 1978

Mr. John A. De Luca

President

Wine Institute

165 Post Street

San Francisco, CA 94108

Dear Mr. De Luca:

In your letter of July 7, 1978, the following question is posed:

"Until legislative or court action further clarifies and defines the scope of the California Supreme Court's decision in the case of Rice v. Alcoholic Beverage Control Appeals Board, will the California Department of Alcoholic Beverage Control continue to administer and enforce those provisions of Sections 24862 and 24866 of the Alcoholic Beverage Control Act which require wine suppliers to post minimum *consumer* prices?"

After a careful reading of the case to which you refer and considering the strictures imposed by the recently enacted Proposition 5, the Department believes it has no choice but to continue to administer and enforce the sections of law not specifically ruled upon by the California Supreme Court.

Among the sections the Department will continue to enforce are those you mention, i.e., Sections 24862 and 24866 of the Alcoholic Beverage Control Act.

If we may be of further assistance, please call on us.

[Signature Omitted in Printing]

EXHIBIT C**State of California****Department of Alcoholic Beverage Control**

File 38195

Reg. 10381

License Nos. 17, 09, 18, 12, 20

In the matter of the accusation against

MID CAL ALUMINUM, INC.

D.B.A. Gallo Wine Co. Respondent(s)

PREMISES: 2650 Commerce Way
CommerceLICENSE(S): Beer & Wine Importer,
Distilled Spirits Importer,
Beer & Wine Wholesaler,
Distilled Spirits Wholesaler,
Off-Sale Beer & Wine**ACCUSATION**Under Alcoholic Beverage Control Act
and State Constitution

I hereby complain and accuse the above respondent(s), holding the above license(s), based on the following statement of fact:

COUNT I

On or about July 21, 1978, respondent-licensee did sell and cause to be sold to Cork & Bib Liquor, Inc., an off-sale general licensee retailer, at 16262 San Fernando Mission Road, Granada Hills, CA, items of wine, to-wit: 4 cases of 1.5 liter bottles Gallo Spanada; 12 cases of 1.5 liter bottles Vin Rose

and 11 cases of 1.5 liter bottles Gallo Rhine Garten, at prices less than the selling prices as posted in the then effective price schedule duly filed with the Department by E. & J. Gallo Winery on May 15, 1978, for said Vin Rose and on April 17, 1978 for said Spanada and Rhine Garten.

COUNT II

Within one year last past and on the dates set forth hereinbelow, respondent-licensee, did sell and cause to be sold to the below-identified retailers, items of wine, to-wit: cases of 1.5 liter bottles of Carlo Rossi Red Mountain brand wines, at which time there was no effective price schedule or an effective fair trade contract duly filed with the Department as required by Rule 101 of Chapter 1, Title 4, California Administrative Code.

<u>Date</u>	<u>Retailer</u>	<u>License #</u>
July 21, 1978	Arthur Harlig 14114 Van Owen Street Van Nuys	21-32725
July 13, 1978	Lucky Stores, Inc.	
July 19, 1978	Albertson's, Inc.	
	Licensed since 12-31-70	

Licensee(s) Previous Record:

Reg. # 4261, Viol Sec. 25502, 25600 & Rule 101(b), 2-13-76 5 days all stayed: Reg. # 16841, Viol Sec. 23661, 3-8-73, 5 days all stayed:

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code;

All Counts

(2) That additional grounds for suspension or revocation under Section 24200 (.....) (.....) (.....), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) 24862—Count I & II

(b) Title IV, Cal. Admin. Code, Rule(s) 101—Count I & II

(c) Other law:

Wherefore, I recommend that a hearing be held on this accusation.

Dated this 15 day of August, 1978

Reviewed: FB(L)

[Signature Omitted in Printing]

* * *

EXHIBIT D

Before The
Department of Alcoholic Beverage Control
of the State of California

File 09, 12, 17, 18, 20-38195

Reg. 10381

In the Matter of the Accusation against:

Mid Cal Aluminum, Inc.

dba: Gallo Wine Co.

2650 Commerce Way

Commerce

Respondent

under the Alcoholic Beverage Control Act.

STIPULATION

The above-named Respondent does hereby:

1. Acknowledge receipt of the Accusation (with printed statement to Respondent) and forms for notice of defense in the above-entitled action.

2. Stipulate to the truthfulness of the facts as set forth in the Accusation.

3. Stipulate as follows:

Based upon Paragraph 2, the Department may, subject to a judicial determination of the constitutionality of Section 24850, et seq., Business and Professions Code and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or sus-

pension of Respondent's licenses as provided in Section 24880 of the Business and Professions Code.

Signed this 15th day of August, 1978.

[Signature Omitted in Printing]

* * *

In the
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992

[ORDER]

[Filed Aug. 29, 1978]

Midcal Aluminum, Inc.

v.

Baxter Rice

By the Court:

Good cause appearing, respondent is hereby commanded forthwith to cease, desist and refrain from any further action on the accusation against petitioner filed August 15, 1978, and from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 Chapter 1, Title 4, California Administrative Code, as to petitioner, pending filing of opposition to the petition for writ of mandate and further order of this court.

Dated: August 29, 1978

Regan, Acting P. J.

* * *

In the Court of Appeal of the State of California
Third Appellate District
3 Civ. 17992

Midcal Aluminum, Inc.,
a California corporation,

Petitioner,

vs.

Baxter Rice as Director of the Department
of Alcoholic Beverage Control of the
State of California,

Respondent,

California Retail Liquor Dealers Associa-
tion, a California corporation,

Intervenor.

Ex Parte Application for Leave to File
Complaint In Intervention
Complaint In Intervention
Supporting Declaration
Memorandum of Points and Authorities

* * *

[Title Omitted in Printing]

EX PARTE APPLICATION FOR
AND COURT ORDER GRANTING
LEAVE TO INTERVENE

The California Retail Liquor Dealers Association, as the representative of its members, hereby applies for leave to intervene in the above captioned action as authorized by

Section 387 of the Code of Civil Procedure on the grounds that it has an interest herein which will be directly affected by the judgment and the temporary restraining order issued, that it has an interest in the success of the respondent, and that its interests are not adequately represented by the existing parties. Intervenor's members' interest affected by the result of this action, and the temporary restraining order issued by this Court are as follows:

(1) The price posting provisions of Chapter 11 of the Alcoholic Beverages Control Act provide direct and substantial protections to intervenor's members against unfair, unlawful and predatory trade practices, and the judgment sought herein, and the temporary restraining order already issued, deprive intervenor's members of those significant protections;

(2) The provisions of Chapter 11 which require fair trade contracts in the marketing of wine in California provide substantial and direct protection to intervenor's members against unfair, unlawful and predatory trade practices, and further, the judgment sought herein, and the temporary restraining order issued by this Court, deprives intervenor's members of substantial and significant economic benefits;

(3) As a practical matter, disposition of this proceeding in the absence of intervenor, or its members, would impair and impede intervenor's members' ability to protect their interests. Intervenor's interest herein are more particularly set forth in the Complaint in Intervention, Points and Authorities, and Declaration accompanying this Application.

I, WILLIAM T. CHIDLAW, attorney at law, am the attorney for the intervenor CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, and declare, under penalty of perjury, that the foregoing is true and correct and that this declaration was executed on September 7, 1978, at Sacramento, California.

[Signature Omitted in Printing]

* * *

In the Court of Appeal of the State of California

Third Appellate District

[Title Omitted in Printing]

3 CIV. 17992

COMPLAINT IN INTERVENTION

Intervenor CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, by leave of Court, alleges:

I

Intervenor is the CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION (hereafter CRLDA), and is a trade association duly organized and existing under the laws of the State of California. Intervenor's membership consists of a substantial number of the independent retail liquor dealers throughout the State of California. Intervenor has over 3,000 members, all of whom are similarly situated with respect to the issues presented by this litigation. Intervenor's members hold approximately one-third of the licenses for retail sales of alcoholic beverages for consumption off premises in California. Intervenor's members are individually too numerous to come before the Court but constitute a class of persons each of whom has

the same substantial and direct interests in the judgment to be rendered herein. Intervenor therefore seeks intervention as the representative of the class of its membership.

II

On August 18, 1978, petitioner MIDCAL ALUMINUM, INC. commenced this proceeding against the respondent, BAXTER RICE as Director of the Department of Alcoholic Beverage Control of the State of California, seeking a writ of mandate to declare Chapter 11 of the Alcoholic Beverage Control Act (Bus. & Prof. Code § 24850 et seq), and regulations promulgated under it, to be invalid under federal law for reasons allegedly set forth in the decision of the California Supreme Court in *Rice v. Alcoholic Bev. etc. Appeals Board (Corsetti)*, 21 Cal.3d 431 (1978).

III

On August 29, 1978, this Court issued a temporary restraining order barring the respondent from any further action on an accusation against petitioner and from enforcing Chapter 11 of the Alcoholic Beverage Control Act.

IV

Chapter 11, and the regulations promulgated under it, require the posting of the prices, with the Department of Alcoholic Beverage Control, at which wine will be sold by wholesalers to retailers. Chapter 11 also contains provisions of the Alcoholic Beverage Control Act requiring fair trade contracts for wine and the posting of the retailer to consumer price. The judgment sought herein is a declaration as to the validity of Chapter 11 and the regulations promulgated thereunder.

V

Intervenor intervenes in this action on the grounds that it has an interest in the matters in litigation and has a substantial interest in the success of the respondent and, as a practical matter, disposition of this matter in the absence of intervenor will impair and impede its members' ability to protect their interests. The matters in litigation are the validity of the wine price posting requirements and the validity of the wine fair trade contracts. Intervenor's members' interests herein are as follows:

(a) The judgment sought herein will directly affect intervenor's members to the extent that it upholds or invalidates resale price maintenance in wine. The statutory and regulatory provisions which petitioner seeks to invalidate here relate to the prices at which intervenor's members buy and sell wine. The resale price maintenance provisions have a direct impact on the profitability of the businesses owned and operated by intervenor's members. Fair trade provisions for wine have also promoted competition in the retail market on the basis of other than price and enabled intervenor's members to provide services that create substantial good will, and which will be lost if resale price maintenance in wine is invalidated. Further, the loss of resale price maintenance for wine will substantially decrease the value of the licenses held by intervenor's members.

(b) Resale price maintenance in wine is intervenor's members' major defense against predatory pricing, discriminatory pricing and other unfair business practices by wholesalers and other retailers of wine.

(c) The challenged sections and the regulations promulgated thereunder also require the posting of the prices from wholesaler to retailer. These prices are filed with respondent and published. Because they are required, in existence and published they act as a deterrent to discriminatory practices as well as an enforcement tool.

(d) In the event that consumer resale price maintenance provisions for wine are invalidated, the price posting provisions of the challenged statutes and regulations will be an even more vital means for intervenor's members to protect themselves against predatory and discriminatory conduct by both wholesalers and other retailers. The requirement of price posting greatly aids in the detection and enjoining of unfair and discriminatory pricing practices, and other violations of the Unfair Practices Act (Bus. & Prof. Code § 17000 et seq) and various other provisions of the Alcoholic Beverages Control Act such as that prohibiting gifts and rebates (Bus. & Prof. Code § 25600). Inasmuch as price wars have already begun, these protections are critical to survival of intervenor's members' businesses.

(e) The temporary restraining order issued on August 29, 1978, is unnecessarily broad and impinges on the rights and interests of intervenor's members. The order frees petitioner from the posting requirements and the fair trade requirements of Chapter 11. Intervenor and all other retailers and all wholesalers remain subject to the requirements of Chapter 11. Under the temporary restraining order, petitioner has obtained unfair competitive advantages. Further, petitioner holds a dominant position in the wine market in the Southern California trading area. Freeing petitioner from Chapter 11 removes major

restraints on the possibility of petitioner's use of its dominant position to engage in predatory and discriminatory price practices which would injure intervenor's members' businesses. Furthermore, petitioner is owned and controlled by four of the six persons controlling and owning the E. & J. Gallo Winery which holds a dominant position in the wine production business in California. There is thus a substantial vertical integration which could be used to further injure competition in the wholesale and retail wine markets. The provisions of Chapter 11 protects intervenor's members against such abuse of market power. Intervenor, therefore, seeks intervention to seek modification of the restraining order to merely limit respondent from proceeding with the imposition of the penalty under the accusation against petitioner pending litigation.

VI

Intervenor has a substantial interest in the success of the respondent herein. However, as shown by the materials attached to the petition on file herein, as Exhibits "A" and "B", the respondent appears to be less interested in upholding the validity of the provisions of the Alcoholic Beverage Control Act involved than intervenor. Respondent did not appeal the decision in *Rice, (Corsetti)*, (supra), to the U.S. Supreme Court notwithstanding that that decision was premised exclusively upon an interpretation of recent United States Supreme Court opinions, and was based solely on federal law. Further, respondent has not objected to the overbroad restraining order sought by petitioner. Intervenor therefore intervenes in order that this matter may be fully litigated and that its members' interests may be protected.

VII

Petitioner has brought this proceeding for the purpose of having Chapter 11 of the Alcoholic Beverage Control Act and the regulations promulgated thereunder (specifically Cal.Admin. Code, Ch. 1, Title 4, Sec. 101) declared invalid as being in violation of the Sherman Antitrust Act (15 USC § 1 et seq.).

VIII

Said provisions are not violative of the Sherman Antitrust Act. The provisions of Bus. & Prof. Code § 24862 and 24866, and the regulations promulgated under them, which require fair trade contracts or price schedules fixing minimum retail to consumer resale prices cannot be violative of the Sherman Act for the reason that they are within the ambit of the 21st Amendment of the United States Constitution, and further, the actions are within the so-called "state action" exemption of the Sherman Act for the reason that they are expressly compelled by the law of the State of California as part of a comprehensive alcoholic beverages regulatory program. The sales of wine involved here are purely sales within the State of California by licensed wholesalers to licensed California retailers, and by those retailers to consumers in California.

To the extent that the provisions of Bus. & Prof. Code §§ 24862 and 24866, and the regulations promulgated thereunder, require the filing and publication of the prices at which wine wholesalers sell to retailers, there can be no possible violation of the Sherman Antitrust Act or any other federal act. Said conduct does not constitute a restraint on trade, and further is a necessary and integral part of the prohibitions against unfair business practices

and other undesirable business and trade practices prohibited by the Alcoholic Beverage Control Act.

WHEREFORE, intervenor prays judgment against petitioner as follows:

1. That CRLDA be permitted to intervene herein on behalf of its members and to answer petitioner's application for a peremptory writ;
2. That this Court issue a published opinion holding that the provisions of Bus. & Prof. Code §§ 24862 and 24866, and the regulations promulgated thereunder, are valid and enforceable and do not violate or are not contrary to the Sherman Antitrust Act either in requiring the posting of prices with the Department of Alcoholic Beverage Control or in requiring minimum resale or fair trade contracts in wine;
3. That this Court modify the restraining order issued on August 29, 1978 by not enjoining enforcement of Chapter 11 and only restraining respondent from proceeding with the imposition of penalty under the accusation against petitioner pending litigation;
4. For the costs of this proceeding;
5. For such other and further relief as the Court may deem just and proper.

Dated: September 7, 1978.

[Signature and Verification Omitted In Printing]

In the Court of Appeal of the State of California

Third Appellate District

3 Civ. 17992

[Title Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES

I

The California Retail Liquor Dealers Association
Should Be Granted Leave to Intervene
in This Proceeding

In an original proceeding in mandamus filed in this Court, petitioner MIDCAL ALUMINUM, INC. (hereafter Midcal) is, in effect, seeking a judicial determination that California Bus. & Prof. Code §§ 24862 and 24866 are invalid under federal law and that this Court order the Director of Alcoholic Beverage Control to "cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act, to-wit, Sections 24850 et seq., . . ." and Rule 101 of the Department relating to the wine price posting. Petitioner has obtained a temporary restraining order relieving it from complying with Chapter 11 of the Act.

The CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION (hereafter CRLDA) seeks to intervene in this proceeding as the representative of its members.¹ Its mem-

¹It is well settled that an organization—even an ad hoc group formed specifically for litigation—may represent its members in an action defending their common interests. See, e.g., *Witkin*, 3 *Cal. Procedure* 2d, Pleading, § 180B (Supp.); 1 *Newberg on Class Actions*, § 1815(b) (1977). These are basically "limited class" actions and are termed "representative actions". *Salton City etc. Owners Assn. v. M. Penn Phillips, Inc.*, 75 Cal.App.3d 184 (1977);

bers' interests are directly affected by the judgment sought and the restraining order already issued. Unfavorable disposition of this action will impair and impede its members' ability to protect their interests. Its members' interests may not be adequately protected by existing parties. (See Declaration of Mandella attached as Exhibit "A".) Leave to intervene under C.C.P. § 387 should therefore be granted.

C.C.P. § 387 was significantly amended by Stats 1977, Ch. 450, § 1. Although intervenor is aware of no case that has yet interpreted the amendment,² it appears that the addition of subsection (b) was intended to clarify and expand the right to intervene to cover situations such as that involved here—where the intervenor has significant interests affected by the precedent sought; where, as a practical matter, the outcome will impair or impede the intervenor's ability to protect that interest; and the existing parties may not adequately protect that interest. See, "Review of Selected 1977 California Legislation", 9 *Pacific LJ* at 356-358 (1978); C.E.B., 2 *Civil Procedure Before Trial*, § 25.1 (1978).

The courts developed a somewhat similar "fairness" standard for intervention under C.C.P. § 387 as it read prior to the 1977 amendment. In *Bustop v. Superior Court*,

Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal.App. 3d 117, 109 Cal.Rptr. 724 (1973). Trade associations may represent their members in proceedings challenging the validity of legislation affecting the members' business. *Jellen v. O'Brien*, 89 Cal.App. 505, 264 P 1115 (1928). It is appropriate for CRLDA to act as a representative intervenor. See also, *Bustop v. Superior Court (Board of Education of the City of Los Angeles)*, 69 Cal.App.3d 66, 137 Cal.Rptr. 793.

²The amendment was mentioned but not discussed in *Redevelopment Agency v. City of Berkeley*, 80 Cal.App.3d 158, 165 (1978) because the right of intervention was not at issue on appeal.

69 Cal.App.3d 66, 137 Cal.Rptr. 793 (1977) the Court of Appeal directed the lower court to grant leave to intervene based on considerations of fairness. The underlying action was a proceeding to review a desegregation plan for compliance with the opinion of the California Supreme Court. Plaintiffs were members of various ethnic groups who had brought suit to force desegregation. Defendant was the school district in which the intervenor's children attended school. Defendant's plan involved massive busing. Intervenor, representing a large number of middle class, predominantly white, parents of students affected sought intervention to contest the necessity of busing.

The parties opposed intervention because intervenor had a different interpretation of the Supreme Court ruling. 69 Cal.App.3d at 71. The objections to intervention were that intervenor had no direct interest in the "judgment" to be rendered (69 Cal.App.3d at 70) except the general public's interest, which, it was contended was represented by the district. (69 Cal.App.3d at 71.) The trial court denied intervention.

The Court of Appeal ordered the trial court to grant intervention. (This distinguishes the case from other intervention opinions which seem to turn more on whether the trial court's ruling was supported by "substantial evidence".) Since intervenor and the district had dissimilar interpretations of the pertinent case law, the district could not adequately represent intervenor's interests (69 Cal. App.3d at 71-72).

It was also well established under former C.C.P. § 387 that where a party purporting to represent intervenor's interest might not adequately do so, leave to intervene

should be granted. Witkin, 3 *Calif. Procedure 2d*, Pleading, § 208; *Fireman's Fund Insurance Co. v. Gary C. Gerlach*, 56 Cal.App.3d 299, 128 Cal.Rptr. 396 (1976); *Gerald Kobernick v. Walter M. Shaw*, 70 Cal.App.3d 914, 139 Cal. Rptr. 188 (1977). This principle has been applied to actions brought by the government to enforce regulatory statutes enacted, in part, to protect the class of persons represented by the intervenor. *People v. Superior Court (Good)*, 17 Cal.3d 732, 737, 131 Cal.Rptr. 800 (1976). [District Attorney.]

As demonstrated hereinafter, under both present and former C.C.P. § 387, CRLDA qualifies for intervention in this proceeding.

The basic thrust of both the judgment sought herein and the restraining order obtained by petitioner directly challenges the validity, under federal antitrust law, of two sections of the Alcoholic Beverage Control Act, Bus. & Prof. Code §§ 24862 and 24866. These sections require the posting of the prices at which wine is sold by the wholesaler to retailer, (c.f., Bus. & Prof. Code §§ 24756, relating to distilled spirits and 25000 relating to beer). Bus. & Prof. Code § 24862 also prohibits the retail sale of wine by a retailer to a consumer at less than prices contained in either a fair trade contract or in a price schedule filed with the Department of Alcoholic Beverage Control. Petitioners contend that the ruling in *Rice v. Alcoholic Bev. etc. Appeals Board (Corsetti)*, 21 Cal.3d 431 (1978, holding Bus. & Prof. Code § 24755(a)-(f) contrary to the Sherman Act (15 USC §§ 1, 2), also invalidates §§ 24862 and 24866, both as to posting of the price from wholesale to retail and the prohibition of sales from retailer to consumer at less than the

price contained in either a fair trade contract or a price schedule.

The price posting requirements of Bus. & Prof. Code §§ 24862 and 24866 (and the similar requirements of §§ 24756 and 25000) constitute a significant protection for intervenor's members against predatory and discriminatory pricing practices, and unfair competition. Bus. & Prof. Code §§ 17000 et seq. (Unfair Practices Act), 24755(g), 24877, 25600³, (Alcoholic Beverage Control Act).

Resale price maintenance and fair trade contracts were formerly the major defense against such practices[,] (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, 65 Cal.2d 349, 362-363, 55 Cal.Rptr. 23 (1966)), but *Rice (Corsetti)*, (supra), eliminated that protection. However, the Supreme Court in *Rice, (Corsetti)*, took care to point out that its objection was not to "protection", but to the method used:

"Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of price maintenance laws without running afoul of the Sherman Act. Thus, our laws prohibit sale of any product as a 'loss leader' (Bus. & Prof. Code § 17044) and licensees may not offer any premium or gift in connection with the sale of alcohol (§ 25600) . . ." 21 Cal.3d at 458.

³Price wars have already begun in the retail liquor market[,] (Declaration of Mandella, p. 5), with the problems of unfair sales practices such as loss leaders and general price cutting. Intervenor's members' ability to litigate claims against such practices will thus be directly and immediately affected by this Court's ruling on price posting and the restraining order issued on August 29, 1978.

The key to enforcement and thus the protection afforded by these laws, referred to by the *Rice, (Corsetti)* court, however, is in the proof of cost. Bus. & Prof. Code §§ 17040, 17041, 17043, 17044, 17045, 24755(g), 24877, 25600. Further, proof of costs gives rise to presumptions regarding intent to violate the Unfair Practices Act. Bus. & Prof. Code §§ 17026-17029, 17071, 17071.1, *Dooley's Hardware Mart v. Food Giant Markets, Inc.*, 1 Cal.App.3d 105, 107-108, 81 Cal.Rptr. 451 (1969). It is the difficulty of proving the requisite intent that has made the Unfair Practices Act difficult to enforce. *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, (supra), 65 Cal.2d at 362-362 [explaining why the Alcoholic Beverage Control Act required consumer minimum prices and price posting]. Without proof of intent, even the clearest unfair practices cases break down. See, e.g., *Dooley's Hardware Mart v. Food Giant Markets, Inc.*, 21 Cal.App.3d 513, 516-519, 98 Cal. Rptr. 543 (1971); *Tri-Q, Inc. v. Sta-Hi Corp.*, 63 Cal.2d 199, 45 Cal.Rptr. 878 (1965); *William Inglis & Sons Bak. Co. v. ITT-Continental Baking Co.*, 389 Fed.Supp. 1334 (C.D. Cal. 1975).

Without the posting of the prices at which the wholesaler is selling to the retailer the basic, though unsatisfactory, means of discovering whether predatory or discriminatory practices have been engaged in by wholesalers would be to institute litigation and engage in discovery. Proof of costs, even to secure a preliminary injunction (where the requisite quantum of proof is comparatively low) would undoubtedly take extensive, thorough and costly discovery. *Inglis* (supra), 389 Fed.Supp. at 1338.

With posted prices, however, sales practices are readily apparent. In the event of discriminatory pricing or sales below cost (Bus. & Prof. Code §§ 17040, 17043, 17044, 17045, 24755(g), 24877) the presumptions of Bus. & Prof. Code §§ 17026, 17071, and 17071.1 are readily invoked. Further, the mere publication of the posted prices would act as a deterrent to misconduct because of the ease of detection of violations of unfair practices prohibitions.

An adverse decision on the price posting provisions of §§ 24862 and 24866, thus, would deprive intervenor's members of significant protections in the marketing of wine. An adverse decision would undoubtedly be construed by some as invalidating Bus. & Prof. Code §§ 25000 and 24756 which require posting for beer and distilled spirits. Intervenor's members would lose very significant protections from predatory and monopolistic practices that the law presently affords them; protections that are proper and necessary especially because of the sui generis nature of the alcoholic beverages industry. *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (supra), 65 Cal.2d at 362-363, esp. fn. 9.

The judgment sought herein will also directly affect intervenor's members to the extent that it upholds or invalidates resale price maintenance at the consumer level in the sale of wine. *Rice, (Corsetti)* (supra), dealt only with § 24755, subsections (a) through (f) which do not apply to wine. Intervenor is prepared to argue that the decision in *Rice, (Corsetti)* is contrary to the decisions of the U. S. Supreme Court (decisions which are controlling on the exclusively federal questions involved. *United States Constitution*, Art. VI, § 2.)

Resale price maintenance provisions control the prices at which intervenor's members buy and sell wine. Resale price maintenance provisions also have a direct impact on the profitability of intervenor's members' businesses. Without it the value of licenses held by intervenor's members has been drastically reduced. (Declaration of Mandella.)

Quite apart from the controlling effect (or absence of such effect) of the decision in *Rice, (Corsetti)*, that case points up another reason for granting leave to intervene. That reason is that respondent herein appears to be a reluctant litigant. Respondent did not seek U. S. Supreme Court review of the decision in *Rice, (Corsetti)*, although the opinion was premised exclusively on federal law. (Indeed, the opinion was premised almost exclusively on recent decisions of the U. S. Supreme Court thus making it an apt candidate for review.) (See Declaration of Mandella.)

Note also that the exhibits attached to the petition for mandate on file herein show that respondent is continuing to enforce the sections at issue here only because the *Rice, (Corsetti)* decision did not purport to reach them (Exhibit "A" attached to Petition, herein) and because *California Constitution*, Art. III, § 3.5 (added by Proposition 5, June 1978 ballot) apparently bars the respondent from invalidating them. See also the decision of the Alcoholic Beverage Control Appeals Board in *Capiscean Corp.* attached to the petition on file herein. Further, it appears that the respondent did not object to the temporary restraining order issued herein despite detrimental and prejudicial effects. (See Section II, infra.)

Intervenor strongly objects to the apparent view of the respondent that *Rice, (Corsetti)* (supra), applies to the price posting requirement at the wholesale to retail level. Intervenor also objects to the respondent's view that *Rice, (Corsetti)* was correctly decided. (Indeed, as shown in Section II(B), infra, the decision appears to be contrary to recent, pertinent rulings of the United States Supreme Court.)

Intervenor respectfully urges that intervention is required here in order to fully protect the rights of intervenor's members from the direct and detrimental effect of a decision of this Court upholding the contentions of petitioner MIDCAL ALUMINUM, INC.

. . .

Dated: September 7, 1978.

[Signature Omitted In Printing]

EXHIBIT A

DECLARATION OF VICTOR J. MANDELLA

I, Victor J. Mandella, declare:

1. That I am the President of the California Retail Liquor Dealers Association, a corporation, which is seeking intervention in *Midcal Aluminum, Inc. v. Baxter Rice*, 3 Civil 17992.

2. The California Retail Liquor Dealers Association is composed of approximately 3,000 member licensees who are owners and operators of independent liquor stores in California selling alcoholic beverages at retail for consumption off the premises. Of the approximately 10,000 licenses issued for retail sale of alcoholic beverages, several thousand are held by a few large retail chains. Our association is composed of approximately one-half of the remaining licensees. Approximately two-thirds of our members are located in Southern California in the marketing area serviced by Midcal Aluminum, Inc., a wholesale wine distributor, which is the distributor for all but an insignificant amount of Gallo wine products in Southern California. Our Southern California members purchase from Midcal Aluminum and are directly affected by the actions taken by it and by this litigation.

3. The California Retail Liquor Dealers Association exists to serve the interests of persons engaged in the sale of alcoholic beverages at retail in the State of California. The Association is devoted to supporting the economic interests of its members through both legislative activity and litigation on behalf of its members in the alcoholic

beverages field. The members of our association, as well as the other independent alcoholic beverage retailers, built their businesses and made their investments based upon the existence of a marketing system for alcoholic beverages which included both a system of consumer price maintenance and a system of price posting of wholesale to retail prices. The businesses of thousands of retail liquor licensees thus depends on the continuation of a marketing system that minimizes and prevents predatory and monopolistic practices that tend to destroy competition.

4. I am advised that the action filed by Midcal Aluminum, Inc., involves both the posting of the prices at which wine is sold from wholesale to retail, and also the posting of the wine consumer price. Wine constitutes a substantial part of the sales of the typical off-sale package store in California, typically averaging more than 25% of the total gross sales of alcoholic beverages in the typical store. The E. & J. Gallo Winery of Modesto, for which Midcal Aluminum is the basic Southern California distributor, has a market dominance in California which is reputed to be in excess of one-third of the California wine market. The sale of wine in California is becoming an increasingly larger percentage of the total sales of alcoholic beverages and the sales are basically of California produced wine.

5. Our association was first made aware of the pending litigation in this matter on Thursday, August 30, 1978, at which time we learned that an order restraining the Department of Alcoholic Beverage Control from proceeding on an accusation against Midcal Aluminum, Inc., for violation of Section 24862 of the Alcoholic Beverage Control Act had been issued and that the Department of Alcoholic Beverage

Control had been further restrained from enforcing Chapter 11 of Division 9 of the Alcoholic Beverage Control Act and specifically Sections 24862 and 24866 as to Midcal Aluminum. On behalf of the California Retail Liquor Dealers Association, I instructed our attorney to take immediate and appropriate legal action to protect the interests of the members of the association in maintaining the validity of Chapter 11 of Division 9 of the Alcoholic Beverage Control Act.

6. The provisions of Chapter 11 of the Alcoholic Beverage Control Act are of vital concern and importance to all retail off-sale licensees in California since the provisions of Section 24862 which require the posting of the price from the wholesaler to the retailer provide the means for the retailer to determine what price he is being charged, as well as what charges are being made to his competitors to assure that he is not being illegally or unfairly discriminated against. The prices thus posted are required by the Alcoholic Beverage Control Act to be published in trade publications. Generally, in Northern California, the prices from wholesaler to retailer are published in the Beverage Industry News and the Southern California prices are published in Pattersons California Beverage Gazetteer. The discounts that are allowed from wholesaler to retailer are likewise required to be disseminated to all retail licensees.

7. Over the years, from time to time, there have been serious problems in regard to discrimination among retailers by wholesalers in the matter of both the prices charged, the quantity discounts, and in some situations,

from time to time, of rebates, free goods and other secret concessions to large retailers. It is necessary to continue to post the price that the wholesaler charges the retailer in order to prevent the discrimination which would otherwise go unnoticed and result in the financial destruction of retailers who were discriminated against in the matter of discounts for quantity purchases.

8. I am advised that discrimination among similarly situated retailers is not only a violation of the California Alcoholic Beverage Control Act, but in certain circumstances could constitute a violation of the federal Robinson-Patman Act. The price posting provisions from wholesaler to retailer also serve a vital function in our marketing system in California to not only allow a retailer to conduct his business in a more efficient and business-like manner, but also to be sure that he is not being illegally discriminated against by the supplier.

9. California is not unique in requiring that the prices charged by the wholesaler to the retailer be posted. To the best of my knowledge there are at least sixteen states that presently require that these wholesale to retail prices be published in connection with the sale of alcoholic beverages. Of these sixteen states, only five require that, additionally, the consumer price be posted. Thus, it appears that in eleven states there has been determined to be a necessary and legitimate basis for the publication of the price from wholesaler to retailer without the additional requirement of a publication of the retailer to consumer price.

10. All of our members are likewise members of the National Liquor Store Dealers Association, and in that capacity have access to much additional information as to

practices, discriminations and the day-to-day operation of the administration of the Alcoholic Beverage Control Acts in other states, and would thus be able to supply the Court with additional information if necessary.

11. Since the loss of the consumer price maintenance provisions relating to distilled spirits and beer in June of this year as a result of the case of *Rice vs. Alcoholic Beverage Control Appeals Board (Corsetti)*, there have been widespread price wars in California. There has been extensive price advertising, loss leader sales, bargain sales, and other price cutting practices, all with an adverse impact on the profitability of our members' businesses. The value of off-sale retail licenses has been drastically reduced and, in many instances, it is virtually impossible to sell such a license. With the price posting provisions, from wholesale to retail, that we currently have in the Alcoholic Beverage Control Act it has often been true that many of the large, chain retailers have adhered to a cut-rate price that appears to represent at least six percent over the cost of acquisition of the alcoholic beverages involved. Without a publication of the prices from wholesaler to retailer there would be no way to determine what that cost of acquisition was. Thus, even in the chaotic market that exists under the loss of the price maintenance provisions due to the *Corsetti* case, there still is a justification for the wholesale to retail price posting, both to prevent discrimination among similarly situated retailers, and to tend to prevent sales in violation of the California Unfair Practices Act.

12. I am advised that the only party defendant to this action is the Director of the Department of Alcoholic

Beverage Control. After the *Corsetti* case became final in June of 1978, and especially in the month of July 1978, the present Director of Alcoholic Beverage Control indicated on several occasions that he was enforcing the price posting provisions, i.e., from wholesaler to retailer, because the *Corsetti* case had not specifically ruled on the validity of those sections, and that he felt that a judicial determination was necessary. The Director's position is further demonstrated by Exhibits "A" and "B" attached to the Mideal Aluminum, Inc., petition herein.

13. The California Retail Liquor Dealers Association was not a party to the *Corsetti* case, nor was any other retailer in California a party to that case. The only party defending the price maintenance provisions of the Alcoholic Beverage Control Act involving distilled spirits and beer, at the retailer to consumer level, being the present Director of the Department of Alcoholic Beverage Control. After the Supreme Court declared the invalidity of Section 24755, our association requested on several occasions that the Director of Alcoholic Beverage Control appeal the Supreme Court's decision to the United States Supreme Court since we were advised that the *Corsetti* case was decided on federal grounds. The Director declined to do so. In any event, the *Corsetti* case has left the retail package store owners in California without their first line of defense against the predatory and monopolistic practices of giant retailers, and has thus made it vital that the price posting provisions of Section 24862, relating to the posting of the price at which a wholesaler is selling the wine to a retailer, be retained to retain some semblance of an orderly market. It is likewise vital that the price posting provisions

found in the Alcoholic Beverage Control Act relating to distilled spirits and beer also be retained.

14. The California Retail Liquor Dealers Association is not neutral on the question of the interpretation or intent of Section 24862 of the Alcoholic Beverage Control Act, nor on the intent and meaning of all of the sections contained in Chapter 11 of the Alcoholic Beverage Control Act relating to wine price posting. The association will emphatically and vigorously contend for the validity of the sections involved in the petition for writ of mandate herein.

15. As a retailer of some products other than alcoholic beverages in my store, I can say that although most industries do not publish the price list from wholesaler to retailer in an industry-wide publication such as the Beverage Industry News, or Pattersons California Beverage Gazetteer, many of the wholesalers that I do business with do supply price lists that are available to all retailers which set forth the prices at which the product can be purchased from the wholesaler. These lists are not used, to my knowledge, for any purposes other than to inform the retailer as to the price at which he can purchase the items from the wholesaler and to also give him some kind of a check on whether or not his retail competitors are being given a discriminatory price advantage.

16. It is vital that our association be allowed to intervene in this action to present a vigorous defense to the allegations of invalidity of the sections of the Alcoholic Beverage Control Act involved, since there is no one else a party to the action that has such a direct and vital interest in maintaining the validity of the sections involved.

Without the Alcoholic Beverage Control Act sections involved, undetectable discrimination among retailers by wholesalers will result in further great financial loss to many independent retailers. Our members and our association are in a position to furnish the Court with basic data and factual material, both from California and other states, that go to the very heart of the marketing system which is being challenged in this petition.

17. The temporary restraining order issued in this case restraining the Director of Alcoholic Beverage Control from enforcing the provisions of Chapter 11 of the Alcoholic Beverage Control Act against the distributor of the product of the dominant market force in the California wine market, namely Gallo, places all other wholesale distributors in an unequal position and allows this distributor to deal with retailers as to wholesale to retail price and discounts without any effective means of determining whether it is discriminating as among retailers. Investigation by our association reveals that E. & J. Gallo Winery, the producer of Gallo wines, has taken the position that neither it nor its wholesale distributors are required to post the wholesale to retail price as a result of the decision in the *Corsetti* case and apparently neither is in fact posting such prices. We also learned that of the six shareholders that own Dry Creek Corp., which in turn owns E. & J. Gallo Winery, four of them are the sole shareholders of Midcal Aluminum, Inc. It therefore appears that at least in the Southern California market, Midcal Aluminum, Inc., is in a favorable position to insist that E. & J. Gallo Winery comply with the statutory requirement of posting the prices of Gallo wine from wholesale

to retail. To stay the enforcement of the price posting provisions against Gallo's distributor is likewise giving an unfair competitive advantage to the dominant force in the Southern California wine market. The order appears to be unfair to other Southern California wholesale wine distributors and also to Southern California retailers. I would therefore urge this Court to modify the restraining order to allow the Director to enforce the sections involved against Midcal Aluminum, Inc., and to allow that part of the order which restrains the Department from proceeding with the accusation against Midcal Aluminum, Inc., to stand until a final court determination of the issues raised in the petition herein.

18. I respectfully urge this Court, on behalf of all of the members of our association, to allow us to intervene in this proceeding in order to fully protect our rights and businesses.

I declare, under penalty of perjury, that the foregoing is true and correct, and that I have personal knowledge of the matters contained herein, and that if called as a witness I could personally testify to such matters.

Executed on September 6, 1978, at Sacramento, California.

[Signature Omitted in Printing]

In the
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992

[ORDER]

[Filed Sept 22, 1978]
Mideal Aluminum, Inc.

v.

Baxter Rice

By the Court:

The stay order issued by this court on August 29, 1978, is discharged.

Good cause appearing, respondent is hereby commanded forthwith to cease, desist and refrain from any further action on the accusation against petitioner filed August 15, 1978. Respondent is also ordered to refrain from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 Chapter 1, Title 4, California Administrative Code, as to any licensee insofar as they require wine wholesalers to post the minimum retail prices at which wines may be sold to the public, until further order of this court. In other respects, petitioner's request for a stay order is denied.

Dated: September 22, 1978.

/s/ PUGLIA

Puglia, P. J.

* * *

In the
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992

[ORDER]

[Filed Sept. 22, 1978]

Mideal Aluminum, Inc.

v.

Baxter Rice

By the Court:

Let an alternative writ of mandate issue. Respondent's and intervenor's written returns are to be served and filed on or before October 12, 1978. Petitioner's replication, if any, is to be served and filed within 15 days after the filing of the returns.

Dated: September 22, 1978

Puglia, P. J.

* * *

In the
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992

Midcal Aluminum, Inc., a California
corporation,

Petitioner,

v.

Baxter Rice as Director of the Depart-
ment of Alcoholic Beverage Control of
the State of California,

Respondent,

California Retail Liquor Dealers Associa-
tion, a California corporation,

Intervenor.

ALTERNATIVE WRIT OF MANDATE

To BAXTER RICE as Director of the Department of
Alcoholic Beverage Control of the State of California,
Respondent and California Retail Liquor Dealers Associa-
tion, a California corporation, Intervenor:

WHEREAS, MIDCAL ALUMINUM, INC., a Calif.
corp, petitioner herein, has filed its duly verified
petition for writ of mandate and it appearing to this
Court that petitioner herein had no other plain, speedy

or adequate remedy at law and that the relief prayed
for herein should be granted;

NOW, THEREFORE, you the said Baxter Rice as
Director of the Department of Alcoholic Beverage Con-
trol of the State of California, Respondent, are hereby
commanded forthwith to grant the relief prayed for
in this petition and indicate to this Court that you have
done so or that you show cause in writing on or before
October 12, 1978, why you have not done so and why
the relief prayed for in this proceeding should not be
granted.

WITNESS THE HONORABLE ROBERT K.
PUGLIA, Presiding Justice of the Court of Appeal of
the State of California, in and for the Third Appellate
District.

[Attestation and Seal Omitted in Printing]

In The
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992
[ORDER]
[Filed September 28, 1978]
Midcal Aluminum, Inc.
v.
Baxter Rice

By the Court:

The stay order issued by this court on September 22, 1978, is discharged.

Good cause appearing, respondent is hereby commanded forthwith to cease, desist and refrain from any further action on the accusation against petitioner filed August 15, 1978. Respondent is also ordered to refrain from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 Chapter 1, Title 4, California Administrative Code, as to any licensee insofar as they require the posting of minimum retail prices at which wines may be sold to the public, until further order of this court. In other respects, petitioner's request for a stay order is denied.

Dated: September 28, 1978.

Puglia, P. J.

* * *

In The
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992
Sacramento

[ORDER]
[Filed April 19, 1979]
[Midcal] Aluminum, Inc.

v.

Baxter Rice

By the Court:

Intervenor's petition for rehearing is denied.

Dated: April 19, 1979.

PUGLIA, P. J.

* * *

In The
Court of Appeal of the State of California
in and for the
Third Appellate District
3 Civil 17992

[ORDER]

[Filed July 19, 1979]

[Midcal] Aluminum, Inc.

v.

Baxter Rice

By the Court:

Intervenor's request to extend stay order of June 27, 1979,
is granted. Issuance of the peremptory writ of mandate is
stayed pending further order of this court.

Dated: July 19, 1979.

/s/ REGAN

Regan, Acting P. J.

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